(1) Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

FELIX CABAN, Jr.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

1. Where the State prosecutor persuaded a judge erroneously to vacate a valid conviction (a final judgment) that was entered after an agreed plea of guilty, does it violate the federal constitutional guarantee against double (former) jeopardy, to force defendant to trial or to plead again?

PARTIES INVOLVED

Petitioner, Felix Caban, Jr., was the defendant in the Circuit Court of Cook County, Illinois; the Appellant in the Appellate Court of Illinois; and the Petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the Plaintiff in the Circuit Court of Cook County, Illinois; the Appellee in the Appellate Court of Illinois; and the Respondent in the Illinois Supreme Court.

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1. Where the State prosecutor persuaded a judge erroneously to vacate a valid conviction (a final judgment) that was entered after an agreed plea of guilty, to force defendant to trial or to plead again, violates the federal constitutional guarantee against double (former) jeopardy.

Since negotiated pleas of guilty are such an integral component of the American criminal justice system, Certiorari should be allowed so this Court can resolve this important issue that greatly impacts on the continuing serviceability and utility of the negotiated plea process.....12

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Felix Caban, Jr., (hereafter, defendant), prays that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review its judgment [on interlocutory appeal per Ill.Sup.Ct.R. 604(f)], affirming the judgment of the Circuit Court of Cook County, Illinois (which, inter alia, denied his motion to dismiss on double jeopardy grounds), and remanding for trial.

Opinion and Orders Below

The Opinion of the Appellate Court of Illinois, First Judicial District, Sixth Division, No. 1-99-1136, dated January 12, 2001, affirms the judgment of the Circuit Court -- that (inter alia) denied defendant's motion to dismiss on double jeopardy grounds -- and remands for trial. The Appellate Court's Opinion is set out at App. A, pp. App. 1-19.

The Order of the Appellate Court of Illinois, First Judicial District, Sixth Division, No. 1-99-1136, February 27, 2001 denying Petition For Rehearing, is set out at App. B, p. App. 20.

The unreported Order of the Illinois Supreme Court, No. 91233, dated June 6, 2001, denying Petition For Leave To Appeal, is set out at App. C, p. App. 21.

Jurisdictional Statement

The judgment sought to be reviewed was entered by the Illinois Appellate Court on January 12, 2001. (App. A) Rehearing was denied on February 27, 2001. (App. B) The Illinois Supreme Court denied Petition For Leave To Appeal by Order dated June 6, 2001. (App. C)

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

Constitutional Provisions Involved

The federal constitutional provisions involved are the guarantee against double jeopardy of the Fifth Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These provisions are as follows:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Amend. V, U.S. Const.

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Amend. IV, sec. 1, U.S. Const.

STATEMENT OF THE CASE

Felix Caban, Jr., defendant-appellant (hereafter, defendant) was sentenced for murder to 52 years (R 21), pursuant to a plea agreement concurred in by the Hon. Thomas Sumner. (See R 3-22.) Over defendant's objections, the judgment was vacated (C 4) on motion of the State (C 14), and defendant's motion for reconsideration (C 147) was denied (R II, 3-4), because under then-law, 730 ILCS 5/5-8-1(a)(1)(c)(ii), the offense (person 17 or over, killing person under 12) called for a mandatory natural life sentence; and the prosecution proceeded.

Defendant argued, inter alia, that the statute requiring a mandatory natural life sentence, is unconstitutional for violation of an Illinois State constitutional provision known as the single-subject rule. (C 23-25)

The defense also argued that the trial court should defer its ruling until the Illinois Supreme Court ruled on the constitutionality of the statute, which issue was already before it, and decision by the Illinois Supreme Court was then imminent. (See defendant's repeated suggestion to the trial court, C 24 & C 33, that this be done.)

The court (R II, 3-6) denied defendant's motion to dismiss on grounds of former jeopardy. (C 101)

After Notice of Appeal was filed herein (Feb. 23, 1999) (C 155), on November 18, 1999, the Illinois Supreme Court held the statute unconstitutional, in People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102, 243 Ill.Dec. 33 (1999).

Defendant appealed to the Appellate Court of Illinois, pursuant to Ill.Sup.Ct.R. 604(f), from the Circuit Court's orders allowing the State's motion to vacate the plea, denying defendant's motion for discharge on double jeopardy grounds, and denying his motion for reconsideration. The Appellate Court affirmed (App. A, pp. App. 1-19), and denied rehearing (App. B, p. App. 20), and the Supreme Court of Illinois denied leave to appeal. (App. C, p. App. 21)

Statement of Facts

Defendant, age 26 at the time of the offense (R 5) and 28 at the time of change of plea (R 12), was charged with first degree murder for causing the death of Arturo Barrera, the 5-year-old son of his live-in girlfriend. (R 5, 8, 20)

After the State and defendant came to an agreement for a negotiated plea, on the State's express offer to the defendant -- defendant would plead guilty to first degree murder and the State would recommend a sentence of 52 years (R 4) -- the court, after hearing a summary of the facts of the offense (R

4-12), concurred in the agreement. (R 13) The plea was entered (R 13-20), jury waived (R 18), Presentence Investigation waived (R 18-19), finding of guilty with judgment on the finding (R 20), and the court sentenced defendant, "pursuant to the agreement," (R. 21), to 52 years (R 21), with credit for 661 days time considered served. (R 21-22)

In the course of entering his plea, defendant was advised by the court that "These charges are subject to a possible penalty of incarceration in the penitentiary for a determinate period of time between twenty and sixty years, a fine of up to twenty-five thousand dollars or both, do you understand that?" To which the defendant answered, "Yes." (R 15) Whereupon defense counsel stated, "Judge, extended term is also a possibility because of the age of the victim." (R 15) The court then advised defendant that he could be subject to a penalty of (R 15) "up to a hundred years in the penitentiary," (R 16), which defendant stated he understood. (R 16)

Defendant was not advised of any possibility of natural life imprisonment, nor was he advised that such penalty supposedly was mandatory for murder when a person under 12 years of age was killed by a person 17 or over. (See R 13-22.)

Thereafter, the State filed a Motion (to Vacate Plea of Guilty and Reset Cause for Trial) (C 14-15), asserting that the sentence pursuant to the aforesaid

agreement, is contrary to a statute, 730 ILCS 5/5-8-1(a)(1)(c)(ii),[1] that requires the imposition of a natural life sentence where -- as at bar -- the victim is under 12 years of age and the offender is 17 or older.

The court granted the State's motion (Motion, C 14-15; granted, C 4), denied defendant's motion to reconsider (Motion, C 147; denied, R II, 3-4), and denied defendant's motion to dismiss on former jeopardy grounds. (Motion, C 101; Memo, C 144; denied, R II, 5) Defendant appealed (in the nature of an interlocutory appeal), per Ill.Sup.Ct.R. 604(f).

Defendant argued in the Circuit Court, inter alia, that the above statute calling for a mandatory natural life sentence is unconstitutional for violation of an Illinois constitutional provision known as the single-subject rule. (C 23-25) After Notice of Appeal was filed herein (Feb. 23, 1999) (C 155), on November 18, 1999, the Supreme Court so held, in People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102, 243 Ill.Dec. 33 (1999).

As the Appellate Court stated:

> "In People v. Wooters, 188 Ill. 2d 500, 510-20 (1999), our supreme court held that Public Act 89-203 violated the single-subject

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[1] In its Motion, p. 2 (C 15), The State mistakenly miscited the statute as 720 ILCS, rather than 730 ILCS.

clause of the Illinois Constitution. The effect of an unconstitutional amendment is to restore the statute as it existed prior to the amendment. [citation omitted]." (Op. p. 6-7; App. A, p. 8)

However, Wooters was not decided until after the events transpired in the instant case.

Raising the Federal Question

In the Circuit Court of Cook County, Illinois:

Defendant raised the federal question presented, in the Circuit Court of Cook County, Illinois, as follows:

(i) OBJECTING TO VACATION OF JUDGMENT ON MOTION OF STATE:

Over defendant's objections -- wherein defendant argued, inter alia, that that statute is unconstitutional for violation of the single-subject rule (C 23-25)[2] -- the judgment was vacated (C 4) on motion of the State (C 14); and defendant's motion for reconsideration (C 147) was denied. (R II, 3-4)

The defense also argued that the trial court should defer its ruling until the Illinois Supreme Court ruled on the constitutionality of the statute, which issue was already before it, and decision by the Illinois Supreme Court was then imminent. (See defendant's repeated suggestion to the trial court, C 24 & C 33, that this be done.)

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[2] After Notice of Appeal was filed herein (Feb. 23, 1999) (C 155), on November 18, 1999, the Illinois Supreme Court so held, in People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102, 243 Ill.Dec. 33 (1999).

(ii) MOVING TO DISMISS ON FORMER JEOPARDY GROUNDS.

Defendant moved to dismiss on former jeopardy grounds (Motion, C 101; Memo, C 144), and the court denied the motion to dismiss. (R II, 5)

The defense also argued that the trial court should defer its ruling until the Illinois Supreme Court ruled on the constitutionality of the statute, which issue was already before it, and decision by the Illinois Supreme Court was then imminent. (See defendant's repeated suggestion to the trial court, C 24 & C 33, that this be done.)

In the Illinois Appellate Court:

Defendant raised the federal question presented, in his Brief on Appeal in the Appellate Court of Illinois. In his Appellant's Brief ["Def. Br."], Issue 1, is: "Whether defendant's constitutional right to be free from double jeopardy was violated when the court denied his motion for discharge on grounds of former jeopardy." (Def. Br. pp. 5, 8) That this issue was squarely raised on appeal, is evident from the Appellate Court's treatment in its Opinion. (App. A, pp. App. 15-19)

Defendant also argued to the Appellate Court, that the trial court should have held its ruling in abeyance pending the imminent decision of Wooters

by the Supreme Court of Illinois. (See Def. Br. p. 12.)

In the Supreme Court of Illinois:

Defendant raised the above issue in the Supreme Court of Illinois, in his Petition for Leave to Appeal, which was denied without opinion. (App. C, p. App. 21) The precise formulation of the federal constitutional issue, as framed in his Petition for Leave to Appeal, is set out at p. 6 of that Petition.

REASONS FOR GRANTING CERTIORARI

1. Where the State prosecutor erroneously persuaded a judge to vacate a valid conviction (a final judgment) that was entered after an agreed plea of guilty, to force defendant to trial or to plead again, violates the federal constitutional guarantee against double (former) jeopardy.

Since negotiated pleas of guilty are such an integral component of the American criminal justice system, Certiorari should be allowed so this Court can resolve this important issue that greatly impacts on the continuing serviceability and utility of the negotiated plea process.

Defendant's plea agreement -- whereby defendant was to be sentenced to 52 years -- when accepted by the court (R 13) and consummated by the parties, with defendant pleading guilty (R 13-20) and being sentenced to 52 years "pursuant to the agreement," (R 21), resulted in a final judgment. Double jeopardy principles are applicable because after defendant pled guilty, he was sentenced, and there was a final judgment. See Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187 (1977); United States v. Santiago Soto, 825 F.2d 616 (1 Cir. 1987) (no final judgment merely upon plea with no sentencing; but if sentence upon plea, there would be final judgment). This is not a case where defendant's actions after the plea, voided the plea agreement. Ricketts v. Adamson,

483 U.S. 1, 97 L.Ed.2d 1 (1987).

The judge's ruling vacating that final judgment, was based on an unconstitutional, void statute; viz.:

The judge vacated that final judgment on motion of the prosecution over defendant's objections, and persisted in this ruling on defendant's motion for reconsideration, and denied defendant's motion to dismiss on double jeopardy grounds,[3] for totally erroneous reasons -- that a valid statute existed that required a greater sentence. The argument of the State, adopted by the trial court -- that court could not, had no power to, sentence to only 52 years -- is based upon a statute that was, soon after, declared void as unconstitutional.

The unconstitutionality of the statute had been argued to the trial court, and was upon review in the Illinois Supreme Court. Subsequently, the statute was held invalid by the Supreme Court of Illinois. People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102, 243 Ill.Dec. 33 (1999); see pp. 4-5 & 7-8, supra.

The trial court's action here is equivalent to a judge granting a prosecutor's motion for mistrial when there is no manifest necessity to grant a mistrial. In

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[3] Record references are provided in the Statement of the Case, Statement of Facts, and Raising the Federal Question sections of this Petition, supra, and not repeated here.

both situations -- erroneous grant of a mistrial, and here, erroneous vacation of a valid, final judgment entered on a valid negotiated plea -- defendant is forced to face jeopardy twice, where the reason for aborting the prosecution is for the sole benefit of and at the request of the prosecution, and there is no manifest necessity for the judge's termination of trial, or, as here, for vacating a final judgment. In such case, absent manifest necessity, requiring defendant to again be tried, violates double jeopardy. Ricketts, supra.

Implicit in Ricketts, supra, is that if the plea is vacated -- not because of defendant violating the plea agreement, but for reasons (as here) not attributable to the defendant -- to vacate the final judgment on motion of the prosecution, and attempt to force defendant to plead again, violates defendant's constitutional right not to be subjected to double jeopardy.

The situation here is that the final judgment entered after agreement of the parties and acceptance by the court, was vacated, based upon the court's adoption of the prosecutor's erroneous assertion that a statute (then under constitutional attack -- and then pending in Illinois Supreme Court) prohibited the sentence agreed upon in the plea agreement.

There was no manifest necessity to vacate the plea. United States v. Perez, 22 U.S. 579, 6 L.Ed. 165

(1824); see Johnson v. Karnes, 198 F.3d 589 (6 Cir. 1999) (reversing denial of habeas to State prisoner; barring retrial after mistrial declared without "manifest necessity) (one factor inducing Court of Appeals to conclude that double jeopardy provision was violated by mistrial, was trial court's "failure seriously to consider alternatives to declaring a mistrial . . . ." Id. at 595). Here, the court could have and should have -- as suggested by the defense -- deferred ruling on the State's motion until the Illinois Supreme Court ruled on the constitutionality of the statute, which issue was then pending before that Court. Thus, here, the trial court failed seriously to consider and utilize a viable alternative to vacating the judgment here. This militates in favor of finding there was no manifest necessity here.

Since negotiated pleas of guilty are such an integral component of the American criminal justice system, Certiorari should be allowed so this Court can resolve this important issue that greatly impacts on the continuing serviceability and utility of the negotiated plea process.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
SIXTH DIVISION
January 12, 2001

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-99-1136

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court of) Cook County.
Plaintiff-Appellee,	)
v.	) No. 97 CR 01085
FELIX CABAN, JR.,	) The Honorable) Thomas R. Sumner,
Defendant-Appellant.	) Presiding Judge.

JUSTICE BUCKLEY delivered the opinion of the court:

In December 1996, a grand jury indicted defendant Felix Caban, Jr., for first degree murder. In October 1998, pursuant to a plea agreement, the trial court sentenced defendant to 52 years' imprisonment.

Two days later, the State moved to vacate the plea and sentence, arguing that defendant's sentence did not conform to statutory guidelines set forth in section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)). The trial court granted the State's motion. Defendant then filed a motion to dismiss, arguing that trial would subject defendant to double jeopardy (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10). The trial court denied defendant's motion and he appeals, arguing that (1) the trial court should have done nothing insofar as section 5-8-1(a)(1)(c)(ii)'s [p. 2] constitutionality was in question; (2) the sentencing scheme under section 5-8-1(a)(1)(c)(ii) did not apply; (3) the trial court's decision to vacate the plea agreement constituted a fourteenth amendment due process violation; and (4) the trial court's decision deprived defendant of his right to avoid double jeopardy. We affirm.

I. BACKGROUND

On October 5, 1998, the trial court conducted a hearing on defendant's case. The parties advised the trial court that they had reached a plea agreement under which defendant would serve 52 years in the penitentiary.

The State advised the trial court that, if the matter proceeded to trial, the evidence would show

that, on December 13, 1996, defendant was babysitting for his live-in girlfriend, Nancy Barrera. Barrera had two children: Arturo (then age five) and Vanessa (then age six). At approximately 8 p.m., Vanessa left the apartment and knocked on her neighbor Angel Baez' door and asked him to come to her apartment. If called upon, Baez would testify that he entered the apartment and saw Arturo lying on the floor. He also saw defendant, who had blood on his face and left hand. Baez saw that Arturo was unconscious and shaking very badly. Baez called for his wife. She entered the apartment, made the same observations, and called 911.

Paramedics arrived and found Arturo lying on the floor and having seizures. They noted bruises on his head and body and rushed him to the hospital, where he died. One paramedic, Arturo Alvarado, would testify that defendant admitted that he struck the [p. 3] boy.

Dr. Al Johnson examined Arturo at Children's Memorial Hospital and would testify that he could determine, within a reasonable degree of medical and scientific certainty, that Arturo's injuries were not accidental and were caused by an adult.

Dr. Mitra Kalelkar would testify that she is a licensed medical doctor and an expert in forensic science. She would testify that she examined Arturo's body on December 16, 1996, and observed several

injuries on his head and face. Specifically, she observed a skull fracture involving the left parietal temporal bone and several subdural brain hemorrhages. She noted lacerations of the left parietal lobe of the brain and a cerebral edema. She also noted a healing rib fracture on the right tenth rib, a healing adrenal laceration on the right side, and other multiple injuries about the body. The State advised the court that, if called to testify, Dr. Kalelkar would opine, within a reasonable degree of medical and scientific certainty, that Arturo died from cranial cerebral injuries sustained as a result of blunt trauma to the head and face. Further testimony from Dr. Mark Reyes, a neuropathologist, would support that of Dr. Kalelkar.

Finally, Assistant State's Attorney Karen O'Malley would testify that she interviewed defendant at police headquarters. O'Malley would testify that defendant admitted that he had been beating Arturo for approximately two or three months, usually once or twice per week. Defendant further admitted to O'Malley that, on the night in question, he lifted Arturo and threw him to the ground. [page 4]

Defendant stipulated to the facts as the State presented them. The court accepted the parties' plea agreement and, after admonishing defendant, sentenced him to 52 years' imprisonment.

On October 7, 1998, the State moved to vacate

the plea and sentence, arguing that the sentence did not conform with section 5-8-1(a)(1)(c)(ii) of the Code of Corrections, which mandates a natural life sentence. On December 21, 1998, the court agreed and granted the State's motion.

On December 30, 1998, the court denied defendant's motion to reconsider. Defendant also filed a motion to dismiss, arguing that this trial would subject defendant to double jeopardy. (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10). The trial court denied defendant's motion, and defendant then filed the instant appeal.

II. ANALYSIS

On appeal, defendant argues that (1) the trial court should have done nothing insofar as the statute's constitutionality was in question; (2) the sentencing scheme under the amended statute did not apply; (3) the trial court's decision to vacate the plea agreement constituted a fourteenth amendment due process violation; and (4) the trial court's decision deprived him of his right to avoid double jeopardy.

A. Statute in Issue

In 1994, section 5-8-1(a) of the Code of Corrections read in pertinent part as follows:

"(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determi- [p. 5] nate sentence set by the court under this [s]ection, according to the following limitations:

(1) for first degree murder,

(a) a term shall be not less than 20 years and not more than 60 years, or

***

(c) if the defendant,

***

(ii) is found guilty of murdering more than one victim,

* * *

(v) *** the court shall sentence the defendant to a term of natural life imprisonment." 730 ILCS 5/5-8-1(a) (West 1994).

Thus, pursuant to the 1994 version of the statute, a violation of section 5-8-1(a), under these

facts, would have subjected defendant to 20 to 60 years' imprisonment. However, our legislature amended section 5-8-1(a) in Public Act 89-203 (Pub. Act 89-203 eff. July 21, 1995)). Under the amended statute, a section 5-8-1(a) violation under these facts would subject defendant to a mandatory life term. As amended, section 5-8-1(a) read in pertinent part as follows:

> "(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determi- [p. 6] nate sentence set by the court under this [s]ection, according to the following limitations:
>
> (1) for first degree murder,
>
> (a) a term shall be not less than 20 years and not more than 60 years, or
>
> ***
>
> (c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if the defendant,
>
> ***
>
> (ii) is a person who, at the time of the

commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim[.]" 730 ILCS 5/5-8-1(a) (West 1994).

B. People v. Wooters

In People v. Wooters, 188 Ill. 2d 500, 510-20 (1999), our supreme court held that Public Act 89-203 violated the single-subject clause of the Illinois Constitution. The effect of an unconstitutional amendment is to restore the statute as it existed prior to the amendment. McCann v. Presswood, 308 Ill. App. 3d [p. 7] 1068, 1073 (1999).

However, Wooters was not decided until after the events transpired in the instant case. Throughout his brief, defendant places considerable weight on the fact that, at the time the trial court considered the State's motion to vacate, the Wooters decision was pending in the supreme court. Therefore, defendant argues, "there was no rational basis for the [circuit court to] grant *** the State's motion to vacate the sentence." We reject this argument. In People v. Wheeler, 299 Ill. App. 3d 245, 252-54 (1998), the Fourth District held that section 5-8-1(a)(1)(c)(ii) of the Code of Corrections did not violate the single-subject rule. A decision of the appellate court,

although not binding on other appellate districts, is generally binding on the circuit courts throughout the state. State Farm Fire & Casualty Co. v. Yapejian, 152 Ill.2d 533, 539-40 (1992). Therefore, until either the First District or the Supreme Court of Illinois held otherwise, the circuit court was required to follow Wheeler.

C. Applicability of Statute

As noted previously, section 4-8-1(a)(1)(c) of the amended statute mandated that "the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed." 730 ILCS 5/5-8-1(a)(c) (West 1998). Defendant interprets this language to mean that the amended statute did "not apply in cases *** where the defendant was not eligible for the death penalty" under section 9-1(b)(7) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)(7) (West 1998)). Therefore, defendant argues, because the life sentence provision did not apply, the trial court [p. 8] erroneously vacated his guilty plea and the judgment thereon.

Defendant cites no authority to support this tenuous interpretation of the amended statute. In any event, because the supreme court found the amendment unconstitutional (Wooters, 188 Ill. 2d at 510-20), we deem this argument moot.

D. Fourteenth Amendment

Defendant next argues that due process "forbids the State *** from depriving defendant of the benefit of plea negotiations in this case." Defendant notes his right to be "free of mental anguish" and argues that "defendants and the public have a right to rely on representations made by the government and the judiciary." We certainly do not quarrel with this general proposition. However, that does not foreclose our analysis.

The United States Supreme Court considered the rule of the due process clause with respect to plea agreements in Mabry v. Johnson, 467 U.S. 504, 81 L. Ed. 2d 437, 104, [sic.] S. Ct. 2543 (1984). There, the defendant entered into plea negotiations with the government. When defense counsel called the prosecutor to express defendant's desire to accept the government's offer, the prosecutor apologized and said that he made a mistake.

On review, the Court held:

"A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of the court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensu- [p. 9] ing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave

> rise to the deprivation of [defendant's] liberty at issue here." Mabry, 467 U.S. at 507-08, 81 L. Ed. 2d at 442, 104 S. Ct. at 2546.

The Court further stated that "[i]t follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." 467 U.S. at 509, 81 L. Ed. 2d at 442, 104 S. Ct. at 2457.

Thus, such agreements are subject to judicial enforcement. Santobello v. New York, 404 U.S. 257, 262, 30 L. Ed. 2d 427, 433, 92 S. Ct. 495, 499 (1971). The integrity of the judicial process requires that plea negotiations be accompanied by adequate safeguards

> "to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello, 404 U.S. at 262, 30 L. Ed. 2d at 433, 92 S. Ct. at 499.

[p. 10] In some instances, specific enforcement of plea arrangements is an appropriate remedy when a party breaches the agreement or when a party has demonstrated substantial reliance on the agreement.

See, *e.g.*, Mabry v. Johnson, 467 U.S. 504, 507-08, 81 L. Ed. 2d 437, 442, 104 S. Ct. 2543, 2546 (1984) (stating that, when a plea rests on a prosecutor's promise, that promise must be fulfilled).

However, specific performance is problematic when the original promise upon which the defendant has relied cannot *legally* be fulfilled, as is the case here. See City of Chicago v. Roman, 184 Ill. 2d 504, 510 (1998) (finding that a trial court generally has no authority to impose punishment other than that provided by statute). The Court in Santobello identified the possible remedies for an unfulfillable plea agreement as either specific performance of the agreement or withdrawal of the guilty plea, with the ultimate decision to be discretionary and guided by the circumstances of each case. Santobello, 404 U.S. at 263, 30 L. Ed. 2d at 433, 92 S. Ct. at 499.

Illinois courts have not squarely addressed this issue with great frequency. In fact, the Second District considered this issue as a matter of first impression in People v. Hare, 315 Ill. App. 3d 606 (2000). In Hare, the defendant and State reached a plea agreement that did not conform to statutory guidelines. The trial court judge accepted defendant's plea and sentenced him. Six days later, on its own motion, the trial court vacated the judgment, declaring the plea agreement void. Hare, 315 Ill. App. 3d at 608. On review, the Second District agreed with the State's argument [p. 11] that the trial court invalidated not only the

sentence, but the plea agreement as well. Hare, 315 Ill. App. 3d at 609-11. The court stated that "when a trial court vacates an illegal sentence that it entered in accordance with a plea agreement, the illegality voids the entire agreement and not merely the sentence." Hare, 315 Ill. App. 3d at 611. Therefore, the court concluded, specific performance was not a viable option. Hare, 315 Ill. App. 3d at 609-11.

Some jurisdictions have reached alternative results. Some courts have held that the proper remedy for an unfulfillable promise is to give defendant the benefit of his bargain. See Commonwealth v. Zuber, 466 Pa. 453, 460-61, 353 A.2d 441, 445-46 (1976) (proper remedy for unfulfillable promise of concurrent sentence was modification of sentence, notwithstanding law that sentences must be consecutive). Other jurisdictions give defendants the option of withdrawing their pleas or receiving specific performance. See State v. Parker, 334 Md. 576, 607, 640 A.2d 1104, 1119 (1994) (defendant's choice of remedy for an unfulfillable plea bargain controls).

However, significant authority supports the result reached in Hare. See, *e.g.*, People v. Jackson, 121 Cal. App. 3d 862, 176 Cal. Rptr. 166 (1981) (finding that, because defendant's guilty plea was induced by a promise of sentence that was less than statutory minimum, defendant may withdraw plea but is not entitled to benefit of bargain of illegal sentence); Chae v. People, 780 P.2d 481, 486 (Colo.

1989) (illegal sentence recommendation as material element of plea agreement will render agreement invalid and require that [p. 12] guilty plea be vacated); State v. Hernandez, 107 Idaho 947, 949, 694 P.2d 1295, 1297 (1985) (plea based on promise that cannot be met by the state must be withdrawn at defendant's insistence); People v. Selikoff, 35 N.Y.2d 227, 228, 318 N.E.2d 784, 791, 360 N.Y.S.2d 623, 633, [sic.] (1974) (specific enforcement not available because any sentence "promise" at the time of plea is, as a matter of law and public policy, conditional upon its being lawful and appropriate; proper remedy is to allow withdrawal of guilty plea). See also C. Vaeth, Annotation, Guilty Plea as Affected by Fact that Sentence Contemplated by Plea Bargain is Subsequently Determined to be Illegal or Unauthorized, 87 A.L.R. 4th 384 (1991).

We find that, generally, the better remedy is for the circuit court to vacate the defendant's guilty plea, as it did in the instant case. This conclusion is supported by our supreme court's repeated finding that the trial court generally has no authority to impose punishment other than that provided by statute. See Roman, 184 Ill. 2d at 510.

Fundamental principles of contract law also support this conclusion. Plea agreements are essentially contractual in nature and, subject to constitutional considerations, are controlled largely by contract law. See People v. Boyt, 129 Ill. App. 3d 1,

18 (1984). One of the most elemental principles of contract law is that an illegal contract is void *ab initio*. See T.E.C. &. Associates, Inc. v. Alberto-Culver Co., 131 Ill. App. 3d 1085, 1096, [sic.] (1985).

E. Double Jeopardy

Defendant also contends that the trial court erred by vacating [p. 13] the judgment (based upon the plea agreement) and by denying his motion to dismiss. This error, defendant contends, subjected him to double jeopardy. We disagree.

Defendant relies primarily on People v. Laws, 29 Ill. 2d 221 (1963). In Laws, a bench trial had already begun and evidence had already been presented when it was learned that the defendant had never entered a plea. The Assistant State's Attorney, believing that a valid judgment of conviction could not be entered without a plea, moved for a mistrial and the court granted the motion. Both the trial court and the Assistant State's Attorney were apparently unaware of an Illinois Supreme Court ruling that a conviction entered absent a plea is valid (People v. Hill, 17 Ill. 2d 112 (1959)[)]. The State then sought and obtained a new indictment. The defendant moved for discharge, and the trial court denied defendant's motion. Defendant appealed from the trial court's order and the supreme court reversed, stating that "neither manifest necessity nor the ends of justice required or justified the mistrial. *** [W]here the trial

court could have proceeded to a valid judgment, it is our opinion that it was an abuse of discretion to declare a mistrial." Laws, 29 Ill. 2d at 225-26. On that basis, the court found that a second trial would violate the defendant's protection from double jeopardy. Laws, 29 Ill. 2d at 226.

Defendant argues that here, as in Laws, "there [was] no 'manifest necessity' [to] abort[] the proceeding ***. *** [T]o proceed with prosecution *** after [an] improperly aborted prosecution[] violates the defendant's *** right against double jeopardy."

[p. 14] We find Laws inapposite to the instant case. Here, the trial court had no discretion to exercise--it was *required* to vacate the judgment against defendant. Our supreme court made that clear in People v. Wade, 116 Ill. 2d 1 (1987). In Wade, defendant was charged with robbery and entered into a plea agreement with the State in which it was stipulated that he had no prior convictions. Pursuant to the agreement, the court sentenced Wade to 90 days in jail, with time considered served, and to 36 months' probation. Nine months later, a probation officer informed the trial court that Wade had previously been convicted of armed robbery and rape. These convictions made Wade statutorily ineligible for probation. In the ensuing proceeding, the trial court held that the order granting probation was void due to Wade's ineligibility for probation and resentenced him

to a term of imprisonment. Our supreme court affirmed, ruling that the trial court exceeded its authority, albeit mistakenly, by ordering a penalty unauthorized by the legislature, which has the exclusive authority to establish criminal penalties. Wade, 116 Ill. 2d at 6-7.

We conclude that the trial court was required to vacate the void sentence and that a trial would not subject defendant to double jeopardy. As noted above, a trial court must impose the criminal penalties that the legislature has mandated and has no authority to impose punishment other than that provided by statute. Roman, 184 Ill. 2d at 510. A court generally exceeds its authority when it orders a lesser sentence than that which the statute mandates. See Wade, 116 Ill. 2d at 7. In such a case, the defendant's sentence is illegal and void, and a void judgment may [p. 15] be attacked at any time either directly or collaterally. Roman, 184 Ill. 2d at 510. The duty to vacate a void judgment is based upon the inherent power of the court to expunge from its records void acts of which it has knowledge. See People v. Magnus, 262 Ill. App. 3d 362, 365 (1994).

Our supreme court's decision in People v. Pankey, 94 Ill. 2d 12 (1983), supports our conclusion that double jeopardy does not exist here. In Pankey, the court examined the trial court's judgment and found that the trial court lacked jurisdiction over the defendant. The supreme court held that such a

judgment is "absolutely void and no bar to a subsequent trial in a court which has jurisdiction." Pankey, 94 Ill. 2d at 20.

III. CONCLUSION

We find, as did the trial court, that the legislature's act of amending section 5-8-1 of the Code of Corrections rendered defendant's nonconforming sentence void. We further find that the trial court's actions did not subject defendant to double jeopardy.

We note, however, that in Wooters, the supreme court voided the statute that rendered defendant's plea agreement void. Thus, had defendant subsequently gone to trial, been convicted, and sentenced to life imprisonment pursuant to the amended version of section 5-8-1, we would be obliged to vacate defendant's sentence. However, that did not happen. Therefore, our opinion confines itself to the events that transpired.

It is entirely possible that, when this case goes back to the circuit court, defendant may be eligible to receive the 52-year plea agreement that he and the State originally contemplated. [p. 16] While that may render this appeal somewhat academic, we cannot hold, as a matter of law, that the State is required to renew its offer of 52 years or that the trial court must enter such a sentence. Rather, that will be up to defendant, the State, and the circuit court.

For the foregoing reasons, we affirm the trial court and remand for trial.

Campbell, P.J., and Gallagher, J., concur.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT - SIXTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,)
)
v.) No. 1--99--1136
)
FELIX CABAN, JR.,)
Defendant-Appellant.)

Order

This cause coming on to be heard on Defendant-Appellant's Petition for Rehearing and pursuant to Supreme Court Rule 367;

IT IS HEREBY ORDERED That the Petition for Rehearing is Denied.

[signed] _____
Justice

_____
Justice

_____
Justice

ORDER ENTERED
FEB 27 2001
APPELLATE COURT, FIRST DISTRICT

APPENDIX C

SUPREME COURT OF ILLINOIS
91233 CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 6, 2001

Mr. Frederick F. Cohn
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601 South LaSalle Street, Suite 700
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No. 91233 - People State of Illinois,
respondent, v. Felix Caban, Jr.,
petitioner. Leave to appeal,
Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 28, 2001.